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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL LEE GOOCH,

Defendant and Appellant.

2d Crim. No. B230500
2d Crim. No. B230448
(Consolidated)
(Super. Ct. No. 1218467)
(Santa Barbara County)
(Super. Ct. No. BA331982)
(Los Angeles County)
ON REHEARING

In these consolidated appeals, Russell Lee Gooch appeals from postjudgment orders denying (1) his motion to terminate a protective order, and (2) his motion to modify the sentence on the ground that it violates the proscription against multiple punishment of Penal Code section 654.¹ We conclude that both orders are nonappealable. We therefore dismiss both appeals.

Procedural Background

Appellant was convicted by a jury of one count of stalking with a protective order in effect (count 1 - § 646.9, subd. (b)); two counts of attempting to dissuade a witness from reporting a crime (counts 2 and 3 - § 136.1, subd. (b)); and one count of

¹ All statutory references are to the Penal Code.

violating a protective order by an act involving a threat of violence. (Count 6 - § 166, subd. (c)(4).) The Santa Barbara County trial court sentenced appellant to prison for six years, suspended execution of the sentence, and granted probation on various terms and conditions. (B209105 Gooch opinion 1) Because appellant entered a treatment program in Los Angeles County, the case was transferred to that county for probationary supervision.

Appellant appealed from the judgment but did not raise a section 654 issue. In an unpublished opinion filed in August 2009, we affirmed the judgment. (*People v. Gooch*, Aug. 4, 2009, B209105.)

In November 2009 the Los Angeles County Superior Court revoked appellant's probation and ordered him to serve the previously imposed six-year prison sentence. Appellant appealed from the revocation order. That appeal - case number B220982 - is not before us.

In Santa Barbara on August 20, 2010, appellant filed a motion to terminate a protective order that the Santa Barbara trial court had issued as a condition of probation. On November 10, 2010, the trial court refused to terminate the protective order as to the victim, Stacy Bruneau. Appellant filed an appeal from the court's order. This appeal - case number B230500 - is before us.

On August 26, 2010, appellant filed in the Los Angeles County Superior Court a motion to modify his six-year prison sentence. Appellant contended that section 654 prohibited punishment for both the stalking (count 1) and the two counts of attempting to dissuade a witness from reporting a crime (counts 2 and 3).² At the time of sentencing, the Santa Barbara trial court had imposed a four-year prison term for the stalking plus a consecutive two-year term for one of the witness dissuasion counts and

² " 'Section 654 prohibits multiple punishment for a single criminal act and for two crimes arising from a single indivisible course of conduct in which the defendant had only one criminal intent or objective. [Citation.]' " (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1296.)

a concurrent two-year term for the other count.³ The Los Angeles court denied the motion to modify, and appellant filed an appeal. This appeal - B230448 - is also before us.

In an unpublished opinion filed on April 19, 2011, Division Seven of the Second District Court of Appeal reversed the Los Angeles Superior Court's order revoking appellant's probation. (*People v. Gooch*, April 19, 2011, B220982.) Division Seven's opinion is not included in the record on appeal. We take judicial notice of the opinion. (Evid. Code, §§ 452, subd. (d), 459.)

On October 6, 2011, the Los Angeles County Superior Court vacated the prison sentence imposed in November 2009 and reinstated appellant's probation "per remittitur" from Division Seven. (Grant of Respondent's Request for Judicial Notice, Minute Order attached as Ex. A to RB)

Appeal in B230500

In case number B230500, appellant is appealing from the Santa Barbara County court's order denying his motion to terminate the protective order as to the victim, Stacy Bruneau. Appellant presents no facts or argument concerning this appeal. We therefore consider the appeal abandoned and dismiss it. (*People v. Butler* (1980) 105 Cal.App.3d 585, 589; *People v. Rodriguez* (1971) 18 Cal.App.3d 793, 795, fn. 1.)

Appeal in B230448

In case number B230448, appellant is appealing from the Los Angeles County court's order denying his motion to modify the six-year prison term, which allegedly violates the proscription against multiple punishment of section 654. Appellant contends that the order is appealable pursuant to section 1237, subdivision (b), which

³ The middle term for dissuading a witness is two years. (§§ 136.1, subd. (b), 18, subd. (a).) Section 1170.15 authorizes a consecutive "full middle term of imprisonment" for this offense. Section 1170.15 creates an exception to "subdivision (a) of Section 1170.1, which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment." (§ 1170.15.)

permits an appeal "[f]rom any order made after judgment, affecting the substantial rights of the party."

We have found only one case directly on point: *People v. Clinton* (1966) 243 Cal.App.2d 284. Pursuant to our request, the parties have submitted supplemental letter briefs on the *Clinton* case. There, the defendant was convicted of three felonies, and the trial court imposed consecutive prison terms. The defendant did not appeal. Four years later, while the defendant was serving his prison sentence, he "filed . . . a motion to vacate the judgment upon the ground that the sentence was excessive under Penal Code section 654." (*Id.*, at p. 286.) The trial court denied the motion, and the defendant appealed. The appellate court noted that, if the facts asserted in the motion were true, the defendant could be punished for only one of the felonies because "all three crimes were parts of a continuous course of conduct, motivated by a single objective." (*Id.*, at p. 287.)

The appellate court observed: "The general rule is that after a sentence has been entered in the minutes of the court and the defendant has begun serving his sentence, the trial court is without jurisdiction to vacate or modify it. [Citation.]" (*People v. Clinton, supra*, 243 Cal.App.2d at p. 288.) There is an exception to this rule "[w]here the sentence pronounced is, on its face, beyond the power of the court to impose for the offense of which the defendant was convicted [Citation.]" (*Ibid.*) But that exception was not applicable in *Clinton*: "[T]he sentence is not on its face improper. The claimed error . . . consists of an improper application of the law to facts which can be found only in the evidence received at the trial or upon the arraignment for judgment." (*Ibid.*)⁴

⁴ There is another exception that is not applicable here: within 120 days after a defendant's commitment to state prison, on its own motion the trial court may "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is not greater than the initial sentence." (§ 1170, subd. (d).) The trial court may also recall the commitment and resentence the defendant "at any time upon

The appellate court therefore concluded: "[T]he court in which defendant was convicted had no jurisdiction to reconsider its sentence in the light of defendant's attack upon it. . . . [¶] Since the [court] lacked jurisdiction to act upon defendant's motion, its order is not appealable." (*People v. Clinton*, *supra*, 243 Cal.App.2d at p. 288; see *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208 ["Since the trial court lacked jurisdiction to modify the restitution fines, its order denying defendant's motion requesting the same did not affect his substantial rights and is not an appealable postjudgment order"].) The appellate court noted: "The excessive sentence could have been corrected by a timely appeal from the judgment" or "by a habeas corpus proceeding brought in the jurisdiction in which the defendant is confined. [Citations.]" (*People v. Clinton*, *supra*, 243 Cal.App.2d at p. 287.)

Here, as in *Clinton*, appellant was serving his prison sentence when he moved to vacate the judgment on section 654 grounds. Accordingly, pursuant to the reasoning of *Clinton*, which we find persuasive, the order denying the motion to vacate is not appealable.

In his supplemental letter brief, appellant requests that we treat his appeal as a petition for a writ of habeas corpus. In support of his request, appellant cites *People v. Roe* (1983) 148 Cal.App.3d 112. *Roe* is distinguishable. There, the appellate court determined that it "would be manifestly unjust" to dismiss the defendant's appeal from the judgment because the trial court had misled him as to his appellate rights. (*Id.*, at p. 118.) The court noted: "To dismiss [defendant's] appeal now would, in effect, deprive him of his right to appeal." (*Ibid.*) Here, the trial court did not mislead appellant as to his appellate rights. Appellant exercised his right to appeal from the judgment, but did not raise the section 654 issue in that appeal. Moreover, the defendant in *Roe* was serving a state prison sentence. Appellant, on the other hand, is

the recommendation of the secretary [of the Department of Corrections and Rehabilitation] or the Board of Parole Hearings." (*Ibid.*)

presently on probation. If he successfully completes probation, the sentencing issue will become moot.

Disposition

The appeals in case numbers B230500 and B230448 are dismissed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

PERREN J.

COFFEE, J.*

*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Denise de Bellefeuille, Judge
Superior Court County of Santa Barbara

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